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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

JUL 02 2003

File: WAC 02 075 50667 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a branch office of a foreign corporation established in India in 1995. Its United States headquarters is located in Santa Monica, California. It is engaged in software development and solutions. It seeks to employ the beneficiary as its project manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary's overseas employment had been in a managerial or executive capacity for one year prior to entering the United States as a nonimmigrant. The director further determined that the petitioner had not established that the beneficiary's assignment for the United States branch office would be in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this case is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

The petitioner has provided adequate documentation that it is a multinational organization with branch offices, subsidiaries, and affiliates both overseas and in the United States. The petitioner provided a list of its several branch offices and wholly owned subsidiaries. The petitioner has both a branch office and a wholly owned subsidiary located in California. However, the petitioner in this case is not the foreign organization's subsidiary, but is the foreign organization doing business in the United States. The petitioner has submitted its Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, to substantiate the legal form of its business. The petitioner's documentary evidence is sufficient to overcome the director's decision in this instance.

The next issues in this proceeding are whether the petitioner established that the beneficiary's assignment in his overseas position and his assignment in the United States was and will be in a primarily managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

The petitioner indicates that the beneficiary's position is in a managerial capacity and not in an executive capacity.

As the director noted, the petitioner initially provided an overview of the beneficiary's duties both as its overseas project manager and as its project manager at the California branch office. In response to the director's request for further evidence on the issue of managerial capacity, the petitioner's attorney provided a breakdown of the beneficiary's duties in his overseas position and for his California position as follows:

> Overall Direction and Defining the scope [sic] of the Project (25%): As a Project Manager the beneficiary is responsible for defining the scope of the project and its overall architecture, per the client's needs and requirements. He defines the milestones and deliverables to be achieved so that the final product conforms to the client specifications.
>
> Planning and Coordinating the Activities of the Software Engineers (45%): The beneficiary provides the direction and guidance to the Software Engineers working on the projects, defines their specific tasks and the coordination of their activities so that the development is done per the clients [sic] specifications. He provides the necessary direction to the team, supervises their work keeping in view the deliverables and milestones of the project.
>
> Communication with the CRM (25%): The beneficiary is also responsible for keeping the CRM and the other senior management of the petitioner informed of the development and progress of the work, development of the work, developments with the clients and the status of his software team.

Miscellaneous (5%): This time is spent on miscellaneous activities, including administrative issues with the team.

The petitioner also provided a copy of the current organizational chart for its overseas office with a notation indicating the placement of the beneficiary's position on the chart from 1995 to 1998. The petitioner's chart indicated that the beneficiary worked on the AutoZone project and that the beneficiary had a team of three engineers reporting to him. The petitioner identifies the beneficiary's subordinates as a senior systems engineer and two software engineers. The petitioner's attorney's response to the director's request for evidence indicated, in addition to the position description, that the beneficiary "had a team of four software professionals working for him on the various projects that he was responsible for." The petitioner's attorney describes the duties of the subordinate employees as including "custom program development, implementation, and systems analysis and design of software systems per client specifications," and "debugging, testing and modifying the software to meet the clients [sic] needs."

The petitioner's attorney provided the same description of duties for the beneficiary's subordinate employees located in the California office. The petitioner also provided an organizational chart for its United States offices. The beneficiary was identified as a project manager who reported to a site manager. The three individuals under the beneficiary's supervision were identified as a project leader and two software engineers.

The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary's assignment for the overseas organization was primarily that of managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. The director also determined that the petitioner's evidence demonstrated that the beneficiary as project manager for the United States office with only three subordinate employees would necessarily be assisting with the day-to-day non-supervisory duties. The director concluded that the evidence did not establish that the beneficiary had been or would be employed in a position that is primarily managerial or executive in scope.

On appeal, counsel for the petitioner asserts that the beneficiary was a senior employee for the overseas entity, responsible for the overall operations of a key client. Counsel also asserts that the beneficiary supervised professional employees. Counsel further asserts "in an organization providing consulting services the manager responsible for overall project development has to provide direction and guidance to his team - these duties necessarily mean that the employee will be employed in a managerial position."

Counsel also submits an affidavit signed by the beneficiary describing his employment for the overseas office.

Counsel's assertions are not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner, through its attorney, has indicated that the beneficiary spends 45 percent of his time guiding the software engineers under his supervision. The Bureau has limited information regarding the duties of the individuals under the beneficiary's supervision, either overseas or in the United States. It is not possible to discern from this limited information that the positions held by the employees under the beneficiary's supervision are professional positions, rather than primarily data entry programmers. Even if the positions subordinate to the beneficiary are primarily professional positions, the record shows that the beneficiary spends less than half of his time directing and guiding these individuals. The beneficiary's assignment, thus, is not primarily a first-line supervisor of individuals in professional positions.

The remaining portion of the beneficiary's time is spent defining the scope of the project and communicating with others regarding the progress of his work. It is not possible to determine whether the beneficiary's involvement in defining the scope of the project is a managerial task or a task involved in actually developing and designing the project(s). An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A more thorough discussion of the beneficiary's actual daily duties for both the overseas position and the United States position substantiated by documentary evidence is necessary to establish that the beneficiary's position is primarily a managerial position. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In sum, the petitioner has not established that the beneficiary primarily manages a department, subdivision, function or component of the petitioner. The petitioner has not established that the beneficiary primarily supervises and controls professional, supervisory, or managerial employees or an essential function of the organization. The petitioner has not established that the beneficiary functions at a senior level within the organizational

hierarchy. The petitioner has not established that the beneficiary's position, either for the overseas entity or the United States office, is a managerial position, rather than a position simply requiring a more experienced employee to develop and design the petitioner's software projects.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.